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Supreme Court of the United States

October Term, 1957

No. 825

DEROY FLOYD, FRANCES FLOYD DYAL, IRENE FLOYD WILLIAMS, and W. D. FLOYD, ROBBY RAY FLOYD, BOBBY GENE FLOYD, DAVID EARL FLOYD, JAMES PRICE FLOYD, HAZEL FLOYD, J. E. FLOYD and JO ANN FLOYD, minors, by and through their next of friend, their father, DEROY FLOYD, Petitioners,

versus

COMPLETE AUTO TRANSIT, INC., Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

Questions . . . . . p. 1

Statement of Facts . . . . . p. 2

Summary of Argument . . . . . p. 5

The Georgia Law . . . . . p. 6

No Conflict Among Circuits . . . . . p. 11

Seventh Amendment Not Contravened . . . p. 13

Other Errors Required New Trial . . . . p. 16

Conclusion . . . . . p. 18

CITATIONS

Affolder v. New York . . . Co., 339 U. S. 96 . . . p. 15
Ballard, et al. v. Forbes, 208 F. 2d 883 (888) (1CCA) . . . . . p. 11
Barry v. Edmund, 116 U. S. 550 . . . . . p. 15
Blue's Truck Lines, Inc. v. Harwell, 59 Ga. App. 305, 200 S. E. 500 . . . . . p. 10
Brest v. Philadelphia Transportation Co., 216 F. 2d 331 (332) (3CCA) . . . . . p. 12
Brown v. Georgia-Tennessee Coaches, 88 Ga. App. 519 77 S.E. 2d 24 . . . . . p. 7
Bucher v. Krause, 200 F. 2d 576 (588) (7CCA) . p. 12
Bunch v. McLeskey, 173 Ga. 545 (3), 161 S. E. 128 . . . . . p. 8
Central Georgia Railway Co. v. Keating, 45 Ga. App. 811, 165 S. E. 873 . . . . . p. 8
Central Truckway System, Inc. v. Harrigan, 79 Ga. App. 118 (4), 53 S. E. 2d 186 . . . p. 8
Chicago Great Western Railroad Co. v. Casura, 234 F. 2d 441 (448-9) (8CCA) . . . . . p. 13
Chicago, Rock Island & Pacific Railroad Co. v. Kifer, 216 F. 2d 753 (756-7) (10CCA) . . . . . p. 13
Cobb v. Lepisto, 6 F. 2d 128 (129) (9CCA) . . p. 13
Cominskey v. Pennsylvania Railroad Co., 228 F. 2d 687 (688) (2CCA) . . . . p. 12
DeLoach Mill Manufacturing Co. v. Tutweiler Coal . . . Co., 2 Ga. App. 493 (3) 58 S. E. 790 p. 16
Engle v. Finch, 165 Ga. 131, 139 S. E. 868 . . . p. 6
Erie Railroad v. Tompkins, 304 U. S. 64 . . . . p. 10
Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474 . . . . . p. 15
Freightways, Inc. v. Stafford, 217 F. 2d 831 (8) (8CCA) . . . . . p. 16

CITATIONS—Continued

Galloway v. U. S., 319 U. S. 372 . . . . . p. 15

General Oil Co. v. Crowe, 54 Ga. App. 139 (187 S. E. 221) . . . . . p. 9

Georgia Railroad & Banking Co. v. Farmer, 45 Ga. App. 130, 164 S. E. 71 . . . . . p. 9

Georgia Railway & Power Co. v. Shaw, 25 Ga. App. 146, 102 S. E. 904 . . . . . p. 9

Glawson v. Southern Bell . . . Co., 9 Ga. App. 450 (4) 71 S. E. 747 (4) . . . p. 7

Happy Valley Farms, Inc. v. Wilson, 192 Ga. 830, 16 S. E. 2d 720 . . . . . p. 17

Hulett v. Brinson, 229 F. 2d 22 (25) (CADC) . p. 13

Jones v. Securities & Exchange Commission, 298 U. S. (p. 1, 24) . . . . . p. 15

Langes v. Green, 282 U. S. 531. 75 L. ed. 520 . . p. 14

Lewis v. Williams, 78 Ga. App. 494, 51 S. E. 2d 532 p. 10

Marron v. Atlantic Refining Co., 176 F. 2d 313 (p. 315) (3CCA) . . . . . p. 17

Neese v. Southern Railway Co., 350 U. S. 77 . . p. 11

New York Central Railroad v. Johnson, 279 U. S. 310 (6&7) . . . . . p. 16

Ocilla Southern Railroad Co. v. Taylor, 27 Ga. App. 733, 110 S. E. 244 . . . . . p. 9

Parsons v. Berford, 3 Pet. 433 . . . . . p. 15

Pickron v. Garrett 73 Ga. App. 61 (3) 35 S. E. 2d 540 . . . . . p. 17

Pollard v. Kent, 59 Ga. App. 118, 200 S. E. 542 . p. 9

Snyder v. U. S., 350 U. S. 906 . . . . . p. 11

Southern Railway Co. v. Harbin, 135 Ga. 122, 68 S. E. 1103 . . . . . p. 17

CITATIONS—Continued

Southern Stages, Inc. v. Brown, 76 Ga. App. 694, 46 S. E. 2d 765 . . . . . p. 16
Spero Nelson v. Brown, et al., 175 F. 2d 86 (89) (6CCA) . . . . . p. 12
Stanbury v. United States, 219 F. 2d 165 (169) . p. 17
Standard Oil Co. v. Reagan, 15 Ga. App. 571, 84 S.E. 69 . . . . . p. 9
Sunray Oil Corporation v Allbritton, 187 F. 2d 475 (477-84) . . . . . p. 14
Swift & Co. v. Lawson, et al., 95 Ga. App. 35 (8) 97 S. E. 2d 168 . . . . p. 10
The Central Railroad v. Rouse, 73 Ga. 393 (1&6) 3 S. E. 307 . . . . . p. 6
Virginian Railway Co. v. Armentrout, 166 F. 2d 400 (407) (4CCA) . . . . . p. 12
W. & A. Railroad v. Townsend, 36 Ga. App. 70 (7) 135 S. E. 439 . . . . p. 8,
Western & Atlantic Railroad Co. v. Jarrett, 22 Ga. App. 313 (96 S. E. 17) . . . . . p. 9
Wilson v. Loewus, 56 Ga. App. 738 (4) 193 S. E. 793 . . . . . p. 17
Yick Wo v. Hopkins, 118 U. S. 356 (369-70) . . p. 14

OTHER REFERENCES

Blashfield's Cyclopedia of Automobile Law and Practice, Vol. 4, Part 1, P. 329, Sec. 2292 . . p. 17
Title 28, Sec. 753 (b) U.S.C.C.A. . . . . p. 17
Ga. Code Ann. Sec. 3-505, 1955 Cum. Pocket Part Supp. and Sec. 105-1310, 1955 Cum. Pocket Part Supp. . . . . p. 7
Ga. Laws 1952 (p. 224 & 245-6) . . . . . p. 7

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versus

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS

I.

In a diversity case does a decision of the Circuit Court of Appeals that the District Court abused its discretion in denying a motion for a new trial on the ground that the verdict of the jury was grossly, inordinately excessive contravene the Seventh Amendment to the Constitution of the United States?

II.

Granting that the Circuit Court of Appeals has the duty to decide whether a District Court has abused its discretion in refusing to grant a new trial on the ground that

the verdict was grossly excessive, should the Supreme Court of the United States be burdened with a review of the record in a diversity case to determine whether the Circuit Court of Appeals erred in reversing the District Court for its alleged abuse of discretion?

III.

There were four additional specifications of error which respondent earnestly contends required the grant of a new trial: (1) grossly improper argument by petitioners' counsel, (2) admission in evidence of an experiment not based on the proven facts, (3) the invalidity of the verdict by reason of repugnancy and (4) the failure of the trial judge to have the argument of counsel reported.

STATEMENT OF FACTS

Respondent believes the following additional facts are necessary for a clear understanding of the issues:

On the night of July 27, 1955, the decedent was standing on the drawbar of a small Farmall Tractor operated by her husband on a Georgia highway. Respondent's truck and trailer unit (alleged in the suit to be of the maximum width and within one foot of the maximum length of vehicles allowable under the law of Georgia), traveling in the same direction as the Farmall Tractor, struck it causing Mrs. Floyd to be thrown to the pavement receiving injuries from which she died six days later.

It was alleged that the respondent's driver was negligent in exceeding the speed limit, in not watching the road and in not seeing the tractor. Respondent denied that its driver was negligent and affirmatively plead that the collision was caused by the failure of the Farmall Tractor to be equipped with a red taillight as required by Georgia

law and further that even if a white light was burning, it was obscured by the decedent standing on the drawbar of the tractor.

The evidence was in dispute as to the speed of respondent's truck and trailer, as to the location of the tractor with respect to the pavement and the distance it could have been seen by respondent's driver.

It was not disputed that the tractor did not have a red taillight. Whether the white light was burning, and, if burning whether the decedent obscured it were in issue.

The trial judge, over objection of respondent, permitted the sheriff of the local county to testify that in an experiment conducted a few days before the trial he could see a tractor with a *"reddish"* taillight of the same kind as the one on which the decedent was riding located in the same place, *but without anyone standing on the drawbar,* for a distance of six-hundred feet before he reached it. (R. 62-4)

In the concluding argument, counsel for petitioners urged the jury to bring in a verdict for the full amount sued for, $165,000.00 "to stop these large trucks from running people off the highway." (R. 264-5)

The trial judge overruled the respondent's motion for a mistrial merely instructing the jury that they weren't trying trucks for running people off the highway and to disabuse their minds of that.

The trial judge did not direct the court reporter to report the argument although the parties had not specifically agreed to the contrary, but the court reporter did record respondent's motion for mistrial, petitioners' counsel's reply and the district judge's ruling.

The jury's verdict was for $107,500.00—$7,500.00 to the husband and $10,000.00 to each child.

Respondent in support of its appeal specified as error the District Court's abuse of its discretion in denying the motion for new trial on the ground of the excessiveness of the verdict, the improper argument, the admission of the sheriff's evidence as to the experiment, the court's failure to have the argument reported and the invalidity of the verdict on account of repugnancy in that the jury by awarding the husband a lesser amount than the children necessarily found that the husband was negligent and that since the wife was guilty of the same negligence as the husband, a verdict for the children for a greater amount than the husband was void, since the mother's negligence was imputable to her children.

The Circuit Court of Appeals held with respect to the alleged improper argument that the record tended to sustain the position of respondent, but that it was not sufficiently clear to justify a reversal on that ground.

The Circuit Court also indicated that the evidence of the sheriff as to the experiment should not have been admitted—certainly not without precautionary instructions.

The alleged errors as to the repugnancy of the verdict and the failure of the trial judge to order the argument reported were not passed upon.

With respect to the alleged abuse of discretion of the trial judge in refusing to grant a new trial on the ground that the verdict was excessive, the Circuit Court of Appeals clearly said:

> "The granting or refusing of a new trial is a matter resting within the sound discretion of the trial court exercised with regard to what is right and within the interest of justice; but that discretion is subject to review by the Appellate Court when it feels that injus-

tice has resulted from the action of the lower court because of its conviction that the verdict was excessive as a matter of law and not merely as a matter of fact."

ARGUMENT

I.

Summary

This is no case for the grant of certiorari.

It involves solely Georgia's unique law with respect to the measure of damages in homicide cases. It would be calamitous if this court should have to assume the burden in diversity cases of reviewing the record to determine whether under the various state laws prescribing the measure of damages the Circuit Courts of Appeals had erred in holding that the District Court has abused its discretion in denying a new trial on the ground that the verdict was excessive.

The decision of the Fifth Circuit is not in conflict with decisions of the other circuits. Indeed, every Circuit Court has held either directly or impliedly that Appellate Courts have a right and duty to determine whether the District Court has abused its discretion in the refusal of a new trial on the ground that the verdict was inordinately excessive.

This decision does not in anywise contravene the Seventh Amendment.

It was clearly correct not only because the verdict was monstrous and gross, but by reason of the other grievous errors which had permeated the verdict.

II.

The Georgia Law

The verdict (the validity of which will be discussed later)—one amount for the husband and another for the children—might cause one unfamiliar with Georgia law to conclude that the measure of damages in a homicide case under Georgia law is determined by the *value of the contributions of the decedent to the survivors.*

In no sense is this true.

As said by the Supreme Court of Georgia in the case of *Engle v. Finch*, 165 Ga. 131; 139 S. E. 868:

> "It (the statute) is penal in that the measure of the recovery is the full value of the life of the deceased, irrespective of its real value to the person in whom the cause of action is vested." (p. 134 Ga.) (p. 869 S. E.)

In an early case it was said by the Supreme Court of Georgia:

> "In a suit by a wife for the homicide of her husband, the number of minor children is not in issue, nor is their means of support . . .
>
> "The measure of damages . . . for the homicide of her husband . . . depends solely on the value of the husband's life."
>
> THE CENTRAL RAILROAD v. ROUSE,
>
> 73 Ga. 393 (1 & 6) 3 S. E. 307

The Georgia Law (Sec. 105-1308) prescribes the same yardstick for the homicide of a wife as it does for a husband.

In an action by the husband under the statute for the homicide of his wife, the measure of damages is the full

value of the life of his wife without additional damages for mental anguish. *Glawson v. Southern Bell . . . Co.*, 9 Ga. App. 450 (4); 71 S. E. 747 (4).

However, the statutory cause of action does not destroy the husband's common law right of action for loss of consortium. *Brown v. Georgia-Tennessee Coaches*, 88 Ga. App. 519; 77 S. E. 2d 24.

Likewise, the right of action of the husband and children to recover the full value of the life of the mother does not impair the administrator's cause of action for the decedent's medical and funeral expenses and her pain and suffering sustained between the date of injury and death. (Ga. Code Ann. Sec. 3-505, 1955 Cum. Pocket Part Supp. and Sec. 105-1310 1955 Cum. Pocket Part Supp.) See also Ga. Laws 1952 (p. 224 & 245-6)

It is true that the Appellate Courts of Georgia have held that a recovery is not denied because the wife and mother did not earn money and there is no direct evidence of the value of the wife's services by the day, week or month.

The jury may apply its own experience and observation in evaluating the decedent's services as a wife and mother.

Of course, a mother renders services around the home for which she receives no monetary compensation. So does the father. The fact that the Supreme Court of Georgia held that there could be a recovery for the homicide of the wife without actual proof of the value of her services did not establish some metaphysical, imaginary standard of recovery to permit a larger verdict for the homicide of a wife than for a husband.

The court knows judicially that if the jury had applied their common experience and observation in determining the value of the deceased around the home, they could

not at the outside have placed a higher valuation than $200.00 per month for such services.

The verdict of $107,500.00 placed the present value of the decedent's life at $110,000.00. It is a matter of simple arithmetic that in order to find the present value of $110,000.00, the jury would have had to establish the average value of the decedent's services for every year of her expectancy at more than $10,000.00 per annum!

As said by the Court of Appeals of Georgia in the case of *Central Georgia Railway Co. v. Keating*, 45 Ga. App. 811; 165 S. E. 873:

> "The full value of the life of the wife . . . is its present value, and that is arrived at by determining from the evidence the gross value of the life of the wife, and then reducing this amount to its present cash value." (p. 819 Ga.) (p. 878 S. E.)

In the case of *Central Truckway System, Inc. v. Harrigan*, 79 Ga. App. 118 (4); 53 S. E. 2d 186, the Court of Appeals of Georgia emphatically rejected the contention that the future lost services of the wife are to be determined according to the enlightened consciences of impartial jurors. (p. 126 Ga. App.) (p. 192 S. E. 2d)

The Georgia law provides that the gross value of the life of the decedent must be reduced to its present cash value on the basis of seven per cent interest, (*Bunch v. McLeskey*, 178 Ga. 545 (3); 161 S. E. 128), as contrasted with the current earning rate of money applicable to actions under the Federal Employers' Liability Act. (*W. & A. Railroad v. Townsend*, 36 Ga. App. 70 (7); 135 S. E. 439)

No reported case in Georgia has remotely approached the size of this verdict for the death of a wife and mother.

We set out below every reported Georgia decision and the amount of the verdict for the homicide of a wife and mother.

1) STANDARD OIL CO. v. REAGAN
15 Ga. App. 571 (84 S. E. 69)
VERDICT: $10,000.00

2) WESTERN & ATLANTIC RAILROAD CO. v JARRETT
22 Ga. App. 313 (96 S. E. 17)
VERDICT: $6,500.00

3) GEORGIA RAILWAY & POWER CO. v SHAW
25 Ga. App. 146 (102 S. E. 904)
VERDICT: $5,000.00

4) OCILLA SOUTHERN RAILROAD CO. v TAYLOR
27 Ga. App. 733 (110 S. E. 244)
VERDICT: $10,000.00

5) GEORGIA RAILROAD & BANKING CO. v. FARMER
45 Ga. App. 130 (164 S. E. 71)
VERDICT: $15,000.00

6) GENERAL OIL CO. v. CROWE
54 Ga. App. 139 (187 S. E. 221)
VERDICT: $13,041.67

7) POLLARD v. KENT
59 Ga. App. 118 (200 S. E. 542)
VERDICT: $9,000.00

8) BLUE'S TRUCK LINES, INC. v. HARWELL
59 Ga. App. 305 (200 S. E. 500)
VERDICT: $35,000.00 reduced to $15,000.00

9) LEWIS v. WILLIAMS
78 Ga. App. 494 (51 S. E. 2d 532)
VERDICT: $7,500.00

Petitioners hint that the case of *Blue's Truck Lines, Inc. v Harwell, supra,* might justify the verdict in this case. It is true that the jury returned a verdict for $35,000.00, but the plaintiffs voluntarily wrote this verdict down to $15,000.00.

It appears from the original record on file in the Court of Appeals of Georgia that the deceased wife and mother was twenty-nine years old earning as a factory worker $1,100.00 to $1,200.00 per annum, and helped around the home in rearing five minor children. The decreased purchasing power of the dollar might affect an amount awarded for pain and suffering, but not the value of a life with shorter expectancy and only slightly higher earnings.

Hence, that decision condemns, instead of supporting, the verdict in the instant case.

The Appellate Courts of Georgia would not have permitted for one moment this verdict to stand. To say that the Circuit Court is powerless would violate *Erie Railroad v. Tompkins* (304 U.S. 64).

In the very recent case of *Swift & Co. v. Lawson, et al.*, 95 Ga. App. 35 (8); 97 S. E. 2d 168, decided in 1957, the Georgia Court of Appeals emphatically disapproved of and set aside a verdict for $80,000.00 for the homicide of a husband and father, who was thirty-eight years of age earning $3,600.00 per annum. It held that the verdict was grossly excessive as a matter of law.

Most assuredly the value of the life of the decedent in the instant case earning not even half as much as the husband in the reported case, with no greater expectancy, must of necessity be far less.

Petitioners' contention that the decision of the Circuit Court of Appeals is in conflict with the decisions of this court in *Neese v. Southern Railway Co.*, 350 U. S. 77 and *Snyder v. U. S.*, 350 U. S. 90, is imaginary. Those two cases involve the measure of recovery under the Federal Employers' Liability Act and the Federal Tort Claims Act.

In the instant case, there is no contention whatsoever that the Circuit Court did not faithfully and strictly follow the law of Georgia in setting this verdict aside. It is not contended that any Georgia decision has been flaunted or overlooked. On the contrary, the Circuit Court placed its decision squarely on the law and decisions of Georgia.

III.

THERE IS NO CONFLICT OF DECISION

The rule so carefully spelled out by the Court of Appeals in this case as to its right and duty to determine whether the District Court has abused its discretion in refusing a new trial on the alleged ground of excessiveness of the verdict is not in conflict with the decisions of the other circuits on that subject. The various circuits seem to be in complete accord.

"In previous decisions we have reviewed the action of the trial court only to determine whether or not it committed an abuse of discretion in denying a new trial on the ground that the damages awarded by the jury were grossly excessive . . ."

BALLARD et al. v. FORBES
208 F. 2d 883 (888) (1CCA)

"The matter of excessive damages is primarily within the discretion of the trial judge . . . though we may re-

view his decision for abuse of discretion."

COMINSKEY v. PENNSYLVANIA RAILROAD CO.
228 F. 2d 687 (688) (2CCA)

"Our function is to determine whether the verdict is so grossly excessive as to justify reversal on the ground that the denial of the motion for a new trial constituted an abuse of discretion."

BREST v. PHILADELPHIA TRANSPORTATION CO., 216 F. 2d 331 (332) (3CCA)

" . . . where a verdict is so excessive that it cannot be justified . . . it is the duty of the judge to set it aside. Failure to do so is an abuse of discretion, analogous to error of law, and as such reviewable on appeal."

VIRGINIAN RY. CO. v. ARMENTROUT,
166 F. 2d 400 (407) (4CCA)

"Where the jury's verdict resolves a factual question, the trial court's action in overruling such a motion cannot be reviewed by this Court unless it involves an abuse of discretion."

SPERO-NELSON v. BROWN, et al.,
175 F. 2d 86 (89) (6CCA)

"In pursuance of this authority, when it is obvious that the trial court has abused its discretion in denying a motion for a new trial based upon a claim of excessive damages, this court may reverse . . ."

BUCHER v. KRAUSE,
200 F. 2d 576 (588) (7CCA)

"We have consistently held that in a tort action, at least where the verdict is not such as has been designated by the United States Supreme Court as 'monstrous', or such as to shock the judicial conscience, the question of the

excessiveness of the verdict is to be determined by the trial court on motion for new trial . . ."

CHICAGO GREAT WESTERN RR. CO. v CASURA
234 F. 2d 441 (448-9) (8CCA)

"We have no hesitation in saying that such a verdict is grossly excessive, and that the refusal of the court to grant a new trial was such an abuse of discretion as is reviewable by this court on writ of error."

COBB v. LEPISTO,
6 F. 2d 128 (129) (9CCA)

"Our province is limited to determining whether the trial court, in denying the motion, abused its discretion."

CHICAGO, ROCK ISLAND & PACIFIC RR. CO. v KIFER, 216 F. 2d 753 (756-7) (10CCA)

"It appears clear that the rule in the Federal courts is that an appellate court may reverse, if at all, for excessiveness of verdict only where the verdict is so grossly excessive or monstrous as to demonstrate clearly that the trial court has abused its discretion in permitting it to stand."

HULETT v. BRINSON,
229 F. 2d 22 (25) (CADC)

Hence, there is no basis for the assertion that there is a conflict between the circuits on the subject.

IV.

THE DECISION BELOW DOES NOT CONTRAVENE THE SEVENTH AMENDMENT.

The Seventh Amendment has never stood in the way of a review by an Appellate Court of an abuse of discre-

tion by the trial court with respect to the grounds of the new trial on an issue of fact tried by a jury. The bar was set up under Sec. 22 of the Judiciary Act of 1789, which antedated the adoption of the Seventh Amendment by more than two years.

We call the court's attention to the scholarly and most exhaustive discussion of the Seventh Amendment and common law as it relates to Appellate review of factual issues by Judge Edwin R. Holmes of the Fifth Circuit in his dissenting opinion in the case of *Sunray Oil Corporation v. Allbritton*, 187 F. 2d 475 (p. 477-84).

The statement that a District Court is vested with a discretion to determine whether the verdict of the jury is inadequate or excessive makes it perfectly plain that the manner of his exercise of the right or duty is reviewable.

As said by this court in the case of *Langnes v. Green*, 282 U. S. 531, 75 L. ed. 520:

> "The term 'discretion' denotes the absence of a hard and fast rule . . . When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result . . .
>
> "The failure to do this, in our opinion, constituted an abuse of discretion subject to the correcting power of the appellate court below and of this court."

See also *Yick Wo v. Hopkins*, 118 U. S. 356 (p. 369-70)

and *Jones v. Securities & Exchange Commission*, 298 U. S. (p. 1, 24).

The failure of the district judge to exercise his discretion with respect to the size of the jury's verdict is no more immune from examination by a Circuit Court than his failure to exercise that discretion as to any other issue of fact.

Indeed, the decision by this court in *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, which is frequently cited as precluding a review by the Circuit Courts of the amount of the verdict clearly shows that the question of abuse of discretion by the district judge was not involved in that case. Justice Brandeis pointed out that the Circuit Court did not say that the district judge had abused his discretion. Here the Circuit Court has said specifically that the district judge did abuse his discretion.

Certainly, Judge Storey made no such holding in *Parsons v. Bedford*, 3 Pet. 433.

We don't believe that this court spoke carelessly through Justice Clark in *Affolder v. New York . . . Company*, 339 U. S. 96, in its statement that it agreed that the amount of damages was not "monstrous in the circumstances of the case." Its reliance of *Barry v. Edmund*, 116 U. S. 550, proves the contrary.

The decision of this court in *Galloway v. U. S.*, 319 U. S. 372, seems to us to constitute absolute authority that the Seventh Amendment never contemplated that it would be employed as an instrument to bar an Appellate Court's review of abuse of discretion by the trial judge.

V.

OTHER ERRORS REQUIRED A NEW TRIAL

Although the argument of counsel was not reported and although counsel for the petitioners in an affidavit filed thirty days after the trial denied that he made the argument, nevertheless, what the court reporter did record demanded the conclusion that highly prejudicial and inflammatory argument had been used by the attorneys for the petitioners.

The plea "to stop these large trucks from running people off the highway" was without evidentiary basis.

True, the petitioners had plead, and proven, that the truck and trailer were of the maximum width and within one foot of the maximum length allowed under the laws of Georgia, but there was no proof that this defendant's trucks, although large, had run people off the highways.

The Court of Appeals of Georgia in an identical case granted a new trial for this type of argument alone even though the trial judge had severely rebuked the attorney. *Southern Stages, Inc. v. Brown*, 76 Ga. App. 694; 46 S. E. 2d 765. This court has condemned such arguments. *New York Central Railroad v. Johnson*, 279 U. S. 310 (6 & 7).

Likewise the admission of the experiment made by the sheriff as to the distance a Farmall Tractor could be seen was prejudicial and error. The conditions under which the experiment was conducted were materially different.

See *Freightways, Inc. v. Stafford*, 217 F. 2d 831 (8) (8CCA), and *DeLoach Mill Manufacturing Co. v. Tutweiler Coal . . . Co.*, 2 Ga. App. 493 (3); 58 S. E. 790.

A new trial should have been granted on account of the repugnancy of the verdict.

In the case of *Happy Valley Farms, Inc. v. Wilson,* 192 Ga. 830; 16 S. E. 2d 720, the Supreme Court of Georgia held that the negligence of the husband did not bar the recovery by the child, although under the law of Georgia the suit must be joint. It went on to hold that if the husband was negligent, but not to the extent of the defendant, the verdict for the husband should be diminished in proportion to his negligence.

The jury by its verdict found that the husband was negligent. The wife and mother had to be guilty of the same degree of negligence in that she was standing directly behind the white light and had to know she was riding on a vehicle which was being operated in violation of law.

See *Blashfield's Cyclopedia of Automobile Law and Practice,* Vol. 4, Part 1, P. 329, Sec. 2292, and *Wilson v. Loewus,* 56 Ga. App. 738 (4); 193 S. E. 793.

Hence, a verdict finding the mother free from negligence in the face of its finding that the husband was negligent is inconsistent, repugnant and void. *Pickron v. Garrett,* 73 Ga. App. 61 (3); 35 S. E. 2d 540, and *Southern Railway Co. v. Harbin,* 135 Ga. 122; 68 S. E. 1103.

The failure of the trial judge to have the argument of counsel reported was error which under the circumstances in the instant case demands a new trial. It was argued in the Circuit Court by petitioners that counsel for respondent did not request the argument to be reported. The law places no such burden upon counsel. Title 28, Sec. 753 (b) U.S.C.C.A., and *Marron v. Atlantic Refining Co.,* 176 F. 2d 313 (p. 315) (3CCA), and *Stanbury v. United States,* 219 F. 2d 165, (p. 169).

CONCLUSION

Respondent most respectfully urges that justice required the grant of a new trial and that this court should not grant the writ of certiorari.

Respectfully submitted,

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